No. 92-333

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term 1992

DETROIT AUTO DEALERS ASSOCIATION, INC. *ET AL.*,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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ISSUES

1. Whether the nonstatutory labor antitrust exemption, applicable to multi-employer collective bargaining agreements for shorter work hours through shorter business hours under *Local 189, Amalgamated Meat Cutters Union v. Jewel Tea Co.*, 381 U.S. 676 (1965), protects employer agreements providing comparable hours reductions demanded by union and non-union employees but not part of a collective bargaining agreement.

2. Whether conduct which did not adversely affect price or output, or have any adverse effect on consumers other than inconvenience, was nevertheless an unreasonable restraint of trade.

3. Whether an unprecedented order that imposes broad and intrusive affirmative obligations on automobile dealerships, including a requirement that they open for business a specified number of hours per week, is not reasonably related to the alleged violation and an abuse of discretion.

Parties to the Proceeding in the Court of Appeals[1]

Dealership Petitioners:
Barnett Pontiac-Datsun, Inc.
Jim Causley Pontiac-GMC Truck, Inc.
Jim Fresard Pontiac, Inc.
Red Holman Pontiac-Toyota-GMC Truck Co.
Art Moran Pontiac-GMC, Inc.
Packer Pontiac Co., a Division of
the Packer Corp.
Rinke Pontiac-GMC Co.
Bob Sellers Pontiac-GMC, Inc.
Shelton Pontiac-Buick, Inc.
Porterfield Wilson Pontiac-GMC Truck, Inc.
Woody Pontiac Sales, Inc.
Jack Cauley Chevrolet, Inc.
Dexter Chevrolet Co.
Dick Genthe Chevrolet, Inc.
James-Martin Chevrolet, Inc.
Jefferson Chevrolet Co.
Lou LaRiche Chevrolet-Subaru, Inc.
Walt Lazar Chevrolet, Inc.
Mark Chevrolet, Inc.
George Matick Chevrolet, Inc.
Matthews-Hargreaves Chevrolet Co.
Merollis Chevrolet Sales & Service
Ed Rinke Chevrolet-GMC Co.
Mike Savoie Chevrolet, Inc.
Les Stanford Chevrolet, Inc.
Stewart Chevrolet, Inc.
Tennyson Chevrolet, Inc.
Buff Whelan Chevrolet, Inc.

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[1]The parties marked with an asterisk do not join this petition, because they are deceased or retired.

Wink Chevrolet Co. d/b/a Bill Wink Chevrolet/GMC
Greenfield AMC/Jeep-Renault, Inc.
Village Jeep-Eagle, Inc.
Armstrong Buick-Opel, Inc.
Fischer Buick-Subaru, Inc.
Krajenke Buick Sales, Inc.
Tamaroff Buick-Honda, Inc.
Audette Cadillac, Inc.
Crissman Cadillac, Inc.
Charles Dalgleish Cadillac-Peugeot, Inc.
Dreisbach & Sons Cadillac Co.
Roger Rinke Cadillac Co.
Birmingham Chrysler-Plymouth, Inc.
Russo-Schebil Enterprises, Inc., d/b/a Lochmoor Chrysler-Plymouth Alfa Romeo Dealer
Shelby Oil Company, Inc., d/b/a Monicatti Chrysler-Plymouth Sales
Roseville Chrysler-Plymouth, Inc.
Bill Snethkamp, Inc.
Thompson Chrysler-Plymouth, Inc.
Westborn Chrysler-Plymouth, Inc.
Colonial Dodge, Inc.
Crestwood Dodge, Inc.
Garrity Motor Sales, Inc.
Mt. Clemens Dodge, Inc.
Northwestern Dodge, Inc.
Oakland Dodge, Inc.
The Meade Group, Inc. d/b/a Pointe Dodge, Inc.
Sterling Heights Dodge, Inc.
Van Dyke Dodge, Inc.
Avis Ford, Inc.
Jerry Bielfield Co.
Beverly John Ford

Jack Demmer Ford, Inc.
Gorno Brothers, Inc.
Jerome-Duncan, Inc.
Al Long Ford, Inc.
McDonald Ford Sales, Inc.
Pat Milliken Ford, Inc.
Russ Milne Ford, Inc.
North Brothers Ford, Inc.
Ed Schmid Ford, Inc.
Stark Hickey West, Inc.
Bob Thibodeau, Inc.
Ray Whitfield Ford
Arnold Lincoln-Mercury Co.
Avon Lincoln-Mercury, Inc.
Bob Borst Lincoln-Mercury, Inc.
Crest Lincoln-Mercury Sales, Inc.
Bob Dusseau, Inc.
Stu Evans Lincoln-Mercury, Inc., of Garden City
Stu Evans Lincoln-Mercury, Inc., of Southgate
Hines Park Lincoln-Mercury, Inc.
Krug Lincoln-Mercury, Inc.
McInerney, Inc.
Bob Maxey Lincoln-Mercury Sales, Inc.
Park Motor Sales Co.
Star Lincoln-Mercury, Inc.
Charnock Oldsmobile, Inc.
Drummy Oldsmobile, Inc.
Gage Oldsmobile, Inc.
Bill Rowan Oldsmobile, Inc.
Suburban Oldsmobile-Datsun, Inc.
Autobahn Motors, Inc.
McAlister Motors, Inc.
Melton Motors, Inc.
Sterling Motors, Inc.
Wood Motors, Inc.

Individual Petitioners:

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Thomas Armstrong
*Charles Audette
Frank Audette
Robert F. Barnett
Jerry M. Bielfield
Robert C. Borst
Robert M. Brent
Paul Carrick
John H. Cauley
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James E. North
James Riehl
*Roger J. Rinke
Roland Rinke
William Ritchie
Arthur J. Roshak
William H. Rowan
Myron P. Savoie
Edward F. Schmid
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Joseph B. Slatkin
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Gordon L. Stewart
Marvin Tamaroff
James P. Tellier
Harry Tennyson

Raymond R. Tessmer
Robert Thibodeau
Joseph P. Thompson
Anthony J. Viviano
Raymond J. Whitfield
Stanley A. Wilk
William J. Wink, Jr.
Donald Wood
Woodrow W. Woody
Robert Zankl

Association Petitioners:
Detroit Auto Dealers Association, Inc.
Tri County Pontiac Dealers Association, Inc.
Greater Detroit Chevrolet Dealers
Association, Inc.
Chrysler and Plymouth Dealers
Association of Greater Detroit, Inc.
Greater Detroit Dodge Dealers
Association, Inc.
Metro Detroit AMC Dealers
Association, Inc.
Metro Detroit Buick Dealers
Association, Inc.
Metro Detroit Cadillac Dealers
Association, Inc.
Metropolitan Detroit Ford Dealers, Inc.
Metropolitan Detroit Oldsmobile
Dealers Association, Inc.
Metropolitan Lincoln-Mercury
Dealers Association, Inc.
Southeastern Michigan Volkswagen
Dealers Association, Inc.
Metropolitan Detroit Chevrolet Dealers
Advertising Association, Inc.

Chrysler Plymouth Dealers of Greater
Detroit Advertising Association, Inc.
Metro Detroit AMC Advertising Association, Inc.
Ford Dealers Advertising Fund, Inc.
Lincoln-Mercury Dealers Advertising
Fund—Detroit District, Inc.
Tri County D.A.A., Inc.

Respondent:
Federal Trade Commission

Statement Pursuant to Rule 29.1:

1. Prior Model Cars, Inc., non-wholly owned subsidiary of Buff Whelan Chevrolet, Inc.

2. Stewart Management Group, Inc., parent of Stewart Chevrolet, Inc.

3. Merollis Enterprises, Inc., parent of Merollis Chevrolet Sales & Service, Inc.

4. Mealey Investment Company, parent of Birmingham Chrysler-Plymouth, Inc.

5. Kenneth Meade Trust, parent of The Meade Group, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Other Opinions

The decision of the FTC and the initial decision of the administrative law judge are published at 111 F.T.C. 417 (1989), and reprinted at 50a and 118a, respectively.

Grounds on Which the Jurisdiction of this Court Is Invoked

(i) The judgment of the United States Court of Appeals for the Sixth Circuit, 955 F.2d 457 (6th Cir. 1992), was entered on March 4, 1992, in accordance with an opinion of the court filed on January 31, 1992. It is reprinted herein at 1a.

(ii) A timely petition for rehearing and suggestion of rehearing en banc were denied by order filed on May 22, 1992.

(iii) Petitioners do not rely on Rule 12.3.

(iv) Jurisdiction is conferred by 28 U.S.C. § 1254 (1).

(v) Jurisdiction in the United States Court of Appeals for the Sixth Circuit was based upon 15 U.S.C. § 45 (c).

Statutes Involved in the Case

> Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

Federal Trade Commission Act, 15 U.S.C. § 45 (excerpt).

Statement of the Case

(i) The Facts

Petitioners are ninety-four automobile dealerships in the Detroit area, seventy-three individual principals of dealerships, eighteen dealer associations, and one association executive (hereinafter jointly referred to as "the Dealers").

During the early 1950's, automobile dealerships in the Detroit metropolitan area were open for business approximately seventy hours a week, including most evenings and Saturdays.[2] The sales employees usually worked all of these hours. 57a; Initial Decision Finding ("IDF") 92-96 at 138a. The employees strenuously objected to seventy hour work weeks. Nevertheless, they believed that they could shorten their work week without loss of income only if all Detroit area dealerships reduced uniformly their sales hours. Otherwise, the employees would lose commission income to salespersons who worked longer or different hours. 57a.

Beginning in approximately 1954, the employees demanded a reduction in their work hours through uniform reductions in the business hours of their employers. They first pressed their demand through a variety of non-union concerted activity, includ-

[2]State law required all dealerships to be closed on Sundays during the relevant time period.

ing negotiations with individual dealerships. IDF 298-99 at 177a. Many Dealers attempted individually to satisfy their employees' demand for shorter work weeks. IDF 120-21, 235-37 at 143a, 163a. They offered to close on different days, or to give employees a day off while the dealership was open, or to share commissions among teams of employees to lessen the impact of "skating" (*i.e.*, loss of commissions to a salesperson who did not make the original sales presentation to the customer), or otherwise to reduce work weeks without uniform Dealer hours. Such dealer-by-dealer concessions did not resolve the labor dispute, because while an individual dealership could shorten its own hours, this would not meet the central demand of its employees for uniform sales hours by all Dealers. Only by the Dealers' uniformly shortening the showroom hours could sales employees effectively accomplish their lawful objective under the labor laws, namely to eliminate competition in wages, hours or working conditions. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 504 n.24 (1940). As a consequence, the employees consistently refused to accept shorter hours on a non-uniform, dealer-by-dealer basis. IDF 101, 235-37, aff'd at 60a.

Following the failure of the non-union activities in the early 1950's, the employees sought to achieve uniform hours reductions through both union and non-union collective activity. There were numerous union organizing campaigns, in all of which the demand for uniform reductions in the work week was critical. These campaigns included the Teamsters in 1954 and in 1959-61; the Salesmen's Guild in 1959-61; the Automotive Salesmen Association in 1966; the Seafarers International Union in 1967; the United Auto Workers in 1970; the Teamsters in 1971; the Teamsters at various times from 1974 until the record was closed, including the month after the FTC issued its complaint seeking to force dealerships to lengthen their hours; and the Professional Automobile Salesmen of Michigan, Inc. ("PASM") in 1979 (the PASM was an association of

employees formed to preserve uniform hours, but asserted it was not a union, and did not seek collective bargaining).

Throughout the course of the labor-management dispute over hours of work, the employees initiated the demands for shorter work weeks through uniform reductions in business hours. The employees engaged in a wide range of concerted activities in their efforts to reduce uniformly the Dealers' hours of operation and to preserve those hours once achieved. These included collective bargaining in those dealerships where the employees were unionized, non-union negotiations in other dealerships, petitions, mass picketing, strikes, vandalism, violence and threats. IDF 163-282 at 150a-173a. While the perpetrators of some of the intimidation obviously remained anonymous, many actions were directly attributable to union members.[3] In other instances, the perpetrators were sales employees, who may or may not have been union members.[4] There was no evidence that any of the Dealers engaged in or condoned the coercion. See n.5 *infra*.

The Dealers, who had experienced or were aware of the turbulent history of union-management relations in Detroit, including a violent city-wide union campaign among dealership service employees in 1947, lawfully resisted the unionization

[3]"One Cadillac dealer testified that shortly before he closed on Saturdays he was approached by two union organizers who 'threatened to burn cars, break out showroom windows.' " IDF 210, cited at 60a. "During the strike at Stuart Wilson Ford [over a five day work week], the teamsters were found [by the NLRB] to have threatened nonstriking employees with physical harm, assaulted employees, placed nails on the driveway, and physically assaulted customers who attempted to cross the picket line." IDF 216 cited at 60a.

[4]One Dealer remained open on Saturdays until picketed by his non-union salesmen, salesmen from other dealerships and union members. During the picketing, "Some of his cars were vandalized. Windows at the dealership were shot out on consecutive Saturdays. His wife and daughter-in-law received threatening telephone calls at home." IDF 248, 166a. One open Dealer received an anonymous telephone call: "We know your daughter is a student at the University of Detroit and we know what route you take to work each day." IDF 276, 172a.

of their sales employees. They also lawfully opposed multi-employer bargaining, which they believed would give the union significant negotiating advantages. IDF 109-11, 157 at 141a, 149a. However, as long as the dispute over hours remained unresolved, the unions and their tactics attracted adherents. 56a-61a.

The Dealers eventually concluded that there was no solution to the lengthy labor dispute other than uniform reductions of sales hours. IDF 238 at 164a. On advice of labor counsel, the Dealers agreed to make uniform concessions to their sales employees. 58a-61a. These concessions included uniform closings on Wednesday and Saturday evenings in 1960; on Friday evenings in 1961; Tuesday evenings in 1966; Saturdays during the summer in 1969 through 1973; and Saturdays year-round in late 1973. The uniform concessions successfully resolved the labor dispute and thereafter maintained peaceful relations between the Dealers and their sales employees.

As in any labor dispute, management (*i.e.*, the Dealers) was aware of and discussed the possible business consequences of the demands of their employees. Nonetheless, the FTC found that the Dealers' agreement to shorten business hours was motivated by the pressure from the employees and their unions, not by a desire to stifle competition. IDF 241, aff'd at 61a ("The primary factor leading to the dealers' decision to close was the demands of the salesmen"). See also IDF 198, 209, 285 at 157a, 159a, 174a. The FTC recognized that "the dealers concluded that the *only* way both to avoid unionization and to achieve labor peace was to give in to the demand for ***uniform***, year-round Saturday closings." 61a (emphasis added). Similarly, although the FTC and court commented that the employees could indirectly benefit from reduced competition among the Dealers, there was neither evidence nor finding that the employees were motivated by anything other than their self-interest in reducing their hours of work without loss of income. IDF 92-104 at 138a-140a.

(ii) The Proceedings

a. The Complaint

In a complaint issued in 1984, the FTC charged that the agreement among Dealers to shorten uniformly their hours of operation violated section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, 38 Stat. 719, as amended.[5]

b. The ALJ Dismissed the Complaint

The administrative law judge dismissed the complaint because the Dealers' conduct was exempt from the FTC Act pursuant to the nonstatutory labor exemption. 201a. He also concluded that the agreement had no adverse effect on competition. 177a, 199a. He concluded that the agreement resulted from a labor dispute, that the Dealers were motivated primarily by labor concerns, and that the hours reductions had a more direct impact on labor competition than on business competition. 200a. Consequently, the nonstatutory labor exemption applied. 201a. Further, he found no substantial injury to competition or consumers, and concluded that any injury there may have been was outweighed by the benefits of labor peace resulting from the agreement. 200a.

c. The FTC Decision

The FTC reversed and upheld the charges in its complaint. 104a. It denied the exemption on the grounds that an agreement

[5]The complaint originally alleged that the Dealers were implicated in violent or unlawful acts directed at dealers who refused to close. At the close of complaint counsel's case, that allegation was dismissed without opposition for lack of evidence. 50a n.1. The complaint also named certain sales persons as respondents, but they were dismissed after the nonstatutory labor exemption was raised as a defense. There also was an allegation that the Dealers agreed with sales persons to reduce hours, but that assertion was dropped as it was inconsistent with the FTC conclusion that the agreement was not exempt because it was among Dealers rather than between Dealers and sales persons.

among employers can be exempt only if it is the result of arm's length negotiations with employees. 73a-74a. It concluded that the Dealers closed in order to avoid negotiating with a union, and consequently the exemption did not apply. 73a-74a.

The FTC concluded that hours of operation is a form of competition among dealers; otherwise the employees would not have needed to coerce the Dealers to close. 82a. It further concluded on the basis of "common sense" and economic theory that there is no economic difference between an agreement to limit hours and an agreement to increase price. 78a-79a. Although conceding that there was no evidence that prices were affected, the FTC concluded that reduced consumer convenience is the equivalent of increased prices. 85a-86a. It therefore concluded that the Dealers' actions were not exempt and violated the FTC Act.

The FTC issued an order which, *inter alia*, requires the Dealers to open for business 64 hours a week for one year and the Dealers' associations to make stenographic transcripts of all business meetings for five years. The order also prohibits all discussion of business hours.

d. The Court of Appeals

The Court of Appeals for the Sixth Circuit affirmed the FTC "generally," and remanded "for limited purposes." 33a. The court noted that the case was "close and difficult" and "presents an issue of first impression and of great difficulty." 33a, 6a. It deferred in part to the FTC. 7a, 18a. It concluded that the exemption is intended to foster the labor policy goal of collective bargaining. 13a. It affirmed the denial of the exemption because the agreement was not a direct product of collective bargaining nor of arm's length dealing with sales persons. 20a-21a.

While expressly not agreeing in all respects with the FTC's rationale, the court found "some" basis in an area that is "murky

and unclear" for the FTC's conclusion that the limitation on hours was anticompetitive. 31a.

The court remanded to determine which individual Dealers engaged in bona fide collective bargaining with a union or closed as a direct result of union directed violence. 23a-24a. It also remanded for reconsideration of several aspects of the order, not here material. 32a.

A petition for rehearing and suggestion of rehearing en banc were denied. 202a-203a.

REASONS FOR GRANTING THE PETITION

I. The Nonstatutory Labor Antitrust Exemption Protects Multi-Employer Conduct Providing Uniform Business Hours as a Bona Fide Response to Demands by Union and Non-union Employees for Shorter Hours of Work Without Reductions in Income.

1. The court of appeals' decision is contrary to *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676 (1965), which involved the resolution of a labor dispute substantively indistinguishable from the dispute and resolution in this case.

In order to shorten their 81 hour work weeks without harming their legitimate interests, the butchers and their union in *Jewel Tea* demanded that grocers in Chicago uniformly reduce their hours of operation. Shorter work weeks without reductions in sales hours would force butchers to work in the evenings, or would permit other employees to perform the butchers' work. The grocers opposed the hours reductions, but over the course of three decades were forced by collective bargaining and strikes to capitulate. 381 U.S. at 694-95.

The Dealers' sales employees also demanded shorter work weeks, and insisted that their interests would be harmed if work weeks were shortened without uniform reductions in their

employers' business hours. The Dealers resisted reducing their hours. It took nineteen years of employee and union negotiation, pressure and strikes, and Dealer concessions and compromises before the labor dispute was resolved in 1973 when the Dealers in Detroit, like the grocers in Chicago, uniformly reduced sales hours.

The basis for the FTC order and the court's affirmance is that, unlike *Jewel Tea* where the employees were all members of a union that collectively bargained the uniform hours reductions, in the present case many employees chose not to unionize, and achieved their legitimate goal through other protected labor activity.[6] But the decision in *Jewel Tea* did not depend on negotiations. The Court analyzed the subject matter of the agreement in light of national labor policy. 381 U.S. at 689. The marketing hours restriction was sought by the workers in their own interest and not at the behest of non-labor groups, and it was intimately related to wages, hours and working conditions. 381 U.S. at 689-90. It was therefore within the protection of the labor policy. 381 U.S. at 689-90. The effect of the hours reductions on competition was "apparent and real" but the effect on the butchers was "immediate and direct." 381 U.S. at 691. Because the workers' actions were "within the protection of the national labor policy" the uniform hours reductions were "therefore exempt from the Sherman Act." 381 U.S. at 690.

We ask this Court to grant a writ of certiorari because the distinction between an agreement collectively bargained by a union and a substantively identical agreement achieved through union and non-union concerted worker action in their self-interest should not determine the applicability of the exemption.

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[6]The fact that some employees may also have committed unfair labor practices by engaging in violence and vandalism does not affect the applicability of the exemption. *Apex Hosiery*, 310 U.S. at 513; *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 906 (9th Cir. 1987). Further, there would be no reason to impose an *antitrust* remedy on the *Dealers* because some *employees* violated the *labor laws*.

2. The FTC and court of appeals distinguished agreements between labor and management (*e.g.*, *Jewel Tea*) from agreements among employers, as in the present matter. They concluded that multi-employer conduct can be exempt only if it is the direct result of arm's-length negotiations with employees. This restriction conflicts with other decisions and with the policy basis for the nonstatutory exemption.

This Court has never required negotiations as a prerequisite to exempting employer conduct resulting from a labor dispute. Other courts have applied the exemption to agreements among employers where at least one of the exempt employers was not engaged in negotiations. In *Amalgamated Meat Cutters and Butchers v. Wetterau Foods, Inc.*, 597 F.2d 133 (8th Cir. 1979), the union sued Wetterau, which had loaned employees to a customer whose employees were on strike. Although Wetterau had engaged in no negotiations, its agreement with another employer was exempt. The court explained that labor law sanctions resistance to union demands, and an agreement among employers that has no anticompetitive effects unrelated to the resistance to labor demands is exempt. See also *Newspaper Drivers & Handlers' Local No. 372 v. NLRB*, 404 F.2d 1159 (6th Cir. 1968), *cert. denied*, 395 U.S. 923 (1969).

In the present case, at least some of the employers negotiated with a union or non-union employees, and some entered into collective bargaining or other agreements. 13a. A labor agreement among Dealers, some of which engaged in negotiations and some of which did not, is substantively indistinguishable from *Wetterau* and *Newspaper Drivers*, in which all of the employers were exempt.

3. The court of appeals, while acknowledging that the nonstatutory exemption is intended to further the policies of the labor laws, actually frustrated those policies by depriving employees of an important benefit obtained through concerted action for their mutual aid and protection.

The exemption is intended to accommodate labor law policy when it conflicts with antitrust policy. *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975) ("labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions"). Here, the court ruled that the only labor policy to be furthered by the exemption is the policy in favor of negotiations, which it (erroneously, as pointed out at 14-15, *infra*) ruled did not occur. 13a. But there are other, equally important labor policies that will be frustrated by this limited view of labor law.

The exemption has its "source" in the policy favoring "the association of employees to eliminate competition over wages and working conditions." *Connell Construction*, 421 U.S. at 622. But "association" is not limited to unionization or negotiation. It includes a broad range of concerted acts, including the acts undertaken by the workers in this case. As explained in *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 905 (9th Cir. 1987) (Kennedy, J.), "the nonstatutory exemption prevents the antitrust laws from being used to frustrate the primary and legitimate goal of the federal labor law, which is to permit employees to organize and act to improve wages and working conditions."

One of the labor law policies, to be sure, is the encouragement of negotiations between unions and management. But that is certainly not the only policy. Other policies include the attainment of labor peace and obtaining for employees uniform and improved working conditions, regardless of whether achieved through negotiations. Labor Management Relations Act, 29 U.S.C. § 141; National Labor Relations Act, 29 U.S.C. § 151; *Apex Hosiery*, 310 U.S. at 504 n.24.

That negotiation is not the sole policy basis of the labor laws is apparent from the labor law protection of a wide range of concerted employee actions other than unionization and negotiation. The labor laws recognize that employees may choose not

to join a union. 29 U.S.C. § 157 ("Employees ... shall also have the right to refrain from ... such activities"); *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954) (the labor laws "were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood"). Employees who are not union members have the same rights as union members to achieve better or uniform wages, hours and working conditions. More to the point, employers faced with concerted employee activity have the same rights whether or not the employees are union members. *Vic Tanny International, Inc. v. NLRB*, 622 F.2d 237, 241 (6th Cir. 1980).

In the absence of a union or other representative, the employees cannot engage in traditional collective bargaining. 29 U.S.C. § 157 ("Employees shall have the right ... to bargain collectively *through representatives* . . . .") They still have the right to engage in concerted activity, which may or may not involve negotiations, to improve working conditions. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978) ("labor's cause often is advanced on fronts other than collective bargaining"). In *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), seven non-union employees walked off the job to protest inadequate heating, without engaging in negotiations, or even presenting a demand to their employer. Notwithstanding the absence of negotiations, their action was protected. In *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938), a group of non-employees demanded that a grocery hire blacks. There was no employment relationship, and no negotiation. The picketing was protected by the labor laws. The Supreme Court has previously ruled that the antitrust laws do not apply to concerted employee actions, although the employees are not union members and do not engage in negotiations. In *Apex Hosiery* only 8 of 2500 workers were union members; a demand had been made but there had been no negotiations.

The FTC and court had no valid basis to deny the employees

their benefit (shorter hours of work without loss of income) because they chose to exercise their rights in one manner permitted by the labor laws instead of another.

4. Although the antitrust laws were not enacted to regulate labor relations, *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Association*, 457 U.S. 702, 712 (1982); *Wetterau Foods*, 597 F.2d at 135, the decision in this case will upset for antitrust reasons an arrangement between labor and management that was motivated by a mutual desire to resolve a long-standing labor dispute.

A restraint imposed in the labor market does not violate the antitrust laws unless it affects business competition in ways that do not follow naturally from the elimination of competition over wages and working conditions. *Connell Construction*, 421 U.S. at 625. In this instance, there can be no doubt (1) that the restraint was imposed for the purpose of resolving a labor dispute and (2) that there are no effects on business competition except as flow naturally from the elimination of competition over hours. The first of these points was explicitly found by the FTC. 61a. The second is inescapable in light of *Jewel Tea*. That is, where the workers demand shorter work hours, and in furtherance of their self-interest insist that all employers uniformly reduce their business hours, the effects on business competition from uniform hours reductions flow naturally from the elimination of competition over hours.

The question boils down to whether employers can be prevented on antitrust grounds from capitulating to a legitimate labor demand for uniformity made by employees through collective action other than traditional labor-management negotiations. The concurring opinion in *Jewel Tea* (Goldberg, J.) explained that it would be "irrational" to permit labor and management to wage industrial warfare but to prohibit them from peaceably settling their disputes. 381 U.S. at 712. In *Richards v. Neilsen*, 810 F.2d at 904, the court held that "any restraint the union imposed falls within the scope of the nonstatutory labor exemption to the antitrust laws."

5. Even if the court correctly concluded that employers can be exempt only if they engage in arm's length negotiations, the court applied such a formalistic definition to negotiations as to exclude the adversarial give-and-take between labor and management found by the FTC. 56a-61a.

It is not clear whether the FTC or the court denied the exemption because the relationship between labor and management was not "arm's length," or because there were no negotiations. In either case, the conclusion is a misapplication of the law to undisputed facts. There is nothing in the record to suggest, and the FTC made no finding, that the employees and the Dealers were in anything but an arm's length relationship. The employees were seeking to further their own interests, not the interests of the Dealers. The fact that the Dealers resisted the demands and coercion of the employees for nineteen years is eloquent proof that the employees were not acting in the Dealers' interest but in their own.

The many years of give-and-take between labor and management constituted negotiations, except in the most limited and formalistic view. True, all Dealers did not as a group sit at a table across from the employees and exchange proposals and counter-proposals, though many individual Dealers negotiated directly with their non-union employees or with union representatives of their employees. 13a.

However, in labor law the concept of negotiation is broad. This Court previously ruled that collective bargaining is a "continuing process" that includes the full spectrum of actions to resolve labor disputes. *Conley v. Gibson*, 355 U.S. 41, 46 (1957). The use of economic self-help to pressure the other side is a recognized facet of bargaining. *International Association of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 146-47 (1976). The ALJ recognized that the sequence of demands, pressure, compromise and resolution engaged in by labor and management from the early

1950's through 1973 was a process of negotiation. 198a. The FTC rejected this conclusion, but neither it nor the court explained why this did not constitute negotiation.

The court's attribution of talismanic significance to formal negotiations is based upon a misreading of *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). The purpose for the negotiation requirement in Mackey was not to limit the exemption to certain types of negotiations, but simply to distinguish between concerted restrictions unilaterally imposed by employers, and those resulting from joint actions of labor and management. *Zimmerman v. National Football League*, 632 F.Supp. 398, 406 (D.D.C. 1986). Here, where the workers extracted the restraint from their unwilling employers, there can be no doubt of the labor bona fides of the restraint.

6. The court misconstrued decisions of this Court to conclude that it was required to defer to the FTC's analysis of the nonstatutory exemption, thereby applying an erroneous standard of review to a "close" decision that required "delicate balancing."

The court stated that *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), required it to give "some deference" to the FTC. 7a. It applied a standard of review of determining whether the FTC's interpretation of the nonstatutory exemption was "reasonable, consistent, and persuasive." 7a. However, the court should have reviewed the application of the nonstatutory exemption *de novo*. Administrative Procedure Act, 5 U.S.C. § 706 ("[T]he reviewing court shall decide all relevant questions of law, interpret ... statutory provisions ..."); *NLRB v. Enterprise Association of Pipefitters*, 429 U.S. 507, 522 n.9 (1977).

Deference is required only where an agency interprets a statute which it administers, *Lechmere, Inc. v. NLRB*, ____ U.S. ____, 117 L.Ed.2d 79, 90 (1992), or bases its conclusion on factors "within its special competence." *ASG Industries, Inc. v. United States*, 548 F.2d 147, 151 (6th Cir. 1977). In *Indiana Federation*, the Court deferred to a conclusion within the traditional expertise of the FTC that a commercial practice is unfair, though recognizing that legal issues beyond an agency's expertise are "for the courts to resolve." 476 U.S. at 454.

The application of the exemption does not require an interpretation of the FTC Act, and neither the FTC nor the court based its decision on any such interpretation. Nor does it call upon the FTC's special expertise on business competition. The FTC has decided only one prior exemption case, in which the exemption was denied because the NLRB had already ruled that the association was not a "labor organization," and there was no "labor dispute." *National Ass'n of Women's & Children's Apparel Salesmen, Inc. v. FTC*, 479 F.2d 139 (5th Cir.), *cert. denied*, 414 U.S. 1004 (1973).

Deference to the FTC is particularly inappropriate because the exemption requires weighing whether the FTC Act should give way to the labor laws. Not surprisingly, the FTC weighed its own jurisdiction more heavily than labor policy. That is why courts, and not agencies, must resolve conflicting Congressional policies. *Fort Knox Dependent Schools v. FLRA*, 875 F.2d 1179 (6th Cir. 1989), *vacated on other grounds*, 496 U.S. 901 (1990).

The court's improper standard of review clearly affected the outcome of the case. The court several times emphasized that the case is "close and difficult." *E.g.*, 33a. The decision required "delicate balancing." 11a. By giving improper deference to the FTC the court upset the delicate balance.

II. The Court Erred in Concluding That Conduct Which Did Not Adversely Affect Price or Output, or Have Any Adverse Effect on Consumers Other Than Inconvenience, Was Nevertheless an Unreasonable Restraint of Trade.

This Court has warned that antitrust enforcement would lack "objective benchmarks" if the Sherman Act were held to reach non-economic harm. *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 53 n.21 (1977). More recently, this Court reversed a finding of injury to competition where the restraint at issue "inconvenienced some patients" but had no impact on price, quality, supply or demand. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde,* 466 U.S. 2, 31 (1984). Nevertheless, the court of appeals affirmed the FTC's conclusion that inconvenience to automobile consumers was an unreasonable restraint of trade, even while acknowledging that the FTC failed to prove actual or potential adverse impact on prices, output, or any other accepted economic injury. 24a-31a.

The court correctly held that a showroom hours agreement must be analyzed under the Rule of Reason, pursuant to which the FTC was required to prove "actual detrimental effects" or "the potential for genuine adverse effects on competition." 26a (quoting *Indiana Federation of Dentists,* 476 U.S. at 460). It recognized the need for caution before condemning association rules where the adverse effect is not "immediately obvious." 26a. The court observed that the impact of the agreement was not "immediately apparent" (26a), echoing what this Court said in *Jewel Tea* regarding restrictions on operating hours: "The decided cases thus do not appear to offer any easy answer to the question whether in a particular case an operating-hours restraint is unreasonable." *Jewel Tea*, 381 U.S. at 692-93 n.6 (*dictum*). Having set the stage, the court rejected the FTC's effort to prove adverse effects, but then inexplicably affirmed the FTC.

The court properly rejected the FTC's position that an agreement to limit shopping hours is the economic equivalent of an agreement to raise prices, pointing out that "there is no showing in this case, and the Commission can claim no reliance on a showing of higher prices or profit margins achieved by petitioners compared to other dealers similarly situated." 28a and n.13.

The court also correctly rejected the FTC's attempt to characterize the Dealers' conduct as a restraint on output. 26a-27a. Under the FTC's tortured definition, hours of operation, rather than units sold, is the appropriate measure of dealership output. 27a-28a. The FTC's assertion that consumers might have been required to "shift their shopping hours" did not alter the court's conclusion, because shifting hours is merely an inconvenience without economic significance. Further, the FTC failed to take into account the "nearby or suburban car dealers" that were not parties to the showroom hours agreement. 28a.

That the FTC found no economic injury is apparent from the conclusion of its discussion of the evidence of effect on prices. It stated,

> In any event, the parties' focus on retail prices misses the point in this case . . . . [C]onsumers pay higher prices as a result of the hours restriction in the form of reduced convenience and service. The income transferred from consumers to dealers is in the form of leisure time, not monetary profits. *These losses are not pecuniary*. . . .

85a. (emphasis added) The point is reemphasized in the discussion of the order, where the FTC states that the forced opening of dealerships will restore the benefit that was lost — "more convenient shopping and additional leisure time." 96a.

The court called the effects issue "murky and unclear," but found "some legal basis" for the FTC's conclusion. 31a. That basis was the FTC's conclusion that hours of operation "is a means of competition" among dealerships. 31a. The court accepted, with reservations, the analogy drawn by the FTC between a showroom hours agreement and the dentists' boycott that was struck down in *Indiana Federation of Dentists*. The FTC and, apparently, the court, read that decision as holding that an agreement that limits an aspect of inter-firm rivalry is, without more, unreasonable. This interpretation is far too broad. The dentists' concerted refusal to cooperate with respect to insurers' cost-containment programs was intended to reduce the role of price in health care purchase decisions. Such concerted efforts to interfere with "the price-setting mechanism of the market" have long been condemned without requiring proof of actual effects on price. *Indiana Federation of Dentists*, 476 U.S. at 461-62.

But this Court has never held that every agreement which arguably involves some aspect of competitive rivalry should be presumed unreasonable regardless of whether there is any plausible impact on price. Unlike the boycott-like behavior in *Indiana Federation of Dentists*, operating-hours restrictions have never been equated with price fixing by this Court, and here the reduced showroom hours were not shown to have affected comparison shopping, consumers' ability to negotiate prices, or the role of price in automobile purchase decisions. Thus, the FTC failed to carry its burden of proof under the Rule of Reason.

Even had the FTC satisfied the first part of the three-part analysis of effects set forth at 27a (that the restraint is inherently suspect), it plainly failed on the second part (whether there are efficiencies). The FTC rejected the Dealers' efficiency justification because the decrease in costs per car sold did not decrease costs per hour the dealership was open, the "output"

that the FTC chose to consider. 83a n.22. The court rejected that definition of output, but did not otherwise address the undisputed fact that overhead costs decreased, *i.e.*, that there were efficiencies. 29a.

III. The FTC's Unprecedented Order Is Not Reasonably Related to the Violation Found Because It Is Disproportionate to the Alleged Minimal Injury.

1. The FTC's cease and desist order, as affirmed by the court of appeals, is unprecedented: It orders the Dealers to increase their business hours to a specified level;[7] it prohibits all discussion of hours, even where agreement is neither sought nor obtained; and it requires verbatim stenographic transcripts of all association meetings for five years. 104a-111a. These intrusive order provisions are beyond the FTC's authority because they are not "reasonably" related to the practices found to violate the FTC Act. *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946); *Katharine Gibbs School, Inc. v. FTC*, 612 F.2d 658 (2d Cir. 1979), *rehearing denied*, 628 F.2d 755 (2d Cir. 1979) (a trade regulation rule had no rational relation to the abuse found because it imposed a refund provision broader than the violating practices).

The violation found by the FTC is the agreement among Dealers to close certain hours of the week in response to demands made by their sales employees, an agreement that even the FTC admits would have been exempt had it been achieved through collective bargaining with unionized employees. 71a ("This would be a much simpler case if, as in *Jewel Tea*, the agreement to limit showroom hours were contained in a formal collective bargaining agreement executed

[7]The court of appeals questioned the specifics of the order (*i.e.*, the court suggested 10.5 hours a day plus some Saturday hours instead of 64 hours per week), but allowed the FTC to order the Dealers to increase their hours to a specified level.

after direct negotiations.") The FTC concedes that the hours reductions inflicted no pecuniary injury. 28a n.13. At worst, it caused consumers some inconvenience, so that forcing the Dealers to extend their hours will provide "more convenient shopping and additional leisure time." 96a. To achieve such minimal gain, the FTC seeks to impose some of the most intrusive provisions ever included in an FTC cease and desist order.

The FTC views this case as a restraint on output. 77a. It stretches the concept of output beyond economic rationality by asserting that the output restrained is not the cars purchased by customers, but the hours the showrooms are open. 77a. Based on this misdefinition of output, it ordered the Dealers to increase their "output" to a specified level. In cases involving real restrictions of output, the FTC and courts do not force a party to end a reduction in output by producing a specified number of products.

In no reported case has the FTC ordered anyone to transcribe meetings, as it does here. No exception is made for meetings on subjects other than hours, or meetings where legal counsel is a participant, or meetings attended by non-Dealers (*e.g.*, representatives of automobile manufacturers), or meetings attended by dealerships that were not parties to the complaint and not subject to the order. Given that the associations already keep minutes of their meetings, and that an agreement on hours would be public, there is no rational reason to impose a transcription burden on any Dealers, and certainly not on non-parties who attend an association meeting.

2. The order prohibits all discussion by the Dealers of hours of operation, even though some discussion is plainly not unlawful. By prohibiting lawful discussion of hours, the FTC impinges on the Dealers' rights of free speech.

Speech which is actually or inherently unlawful can be prohibited. Speech which is only potentially unlawful can be regulated, but it cannot constitutionally be prohibited. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982); *Peel v. Attorney Disciplinary Committee*, 496 U.S. 91 (1990). The FTC's obligation to craft its restrictions on speech narrowly is well-established. *Beneficial Corp. v. FTC*, 542 F.2d 611, 619-20 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

In this instance, an *agreement* among Dealers affecting hours is (according to the FTC) unlawful, but a *discussion* of hours can be unlawful only if it furthers an unlawful agreement. Even the FTC concedes that a discussion of hours in the context of multi-employer collective bargaining is not unlawful. Nor is it unlawful for Dealers planning the annual Detroit auto show to discuss the hours the show will be open, or for Dealers to casually converse about a "midnight madness" sale. In fact, no discussion of hours would be unlawful in the absence of an agreement. By prohibiting all discussion of hours rather than just restricting such discussion, the FTC violates the Dealers' rights to free speech.

3. Even were the FTC's order within its authority, it would be an abuse of discretion because it exposes Dealers, their families and their businesses to serious risk of physical harm in order to terminate an injury which, if it exists at all, is a minor inconvenience. The FTC abused its discretion by failing to consider that the serious adverse repercussions from the order clearly outweigh the minimal benefit. *Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Co.*, 463 U.S. 29, 43-44 (1983) (an agency must at least consider an important aspect of the problem and must have a plausible explanation for its decision that is not counter to the evidence). As noted in *Jacob Siegel*, the FTC must fairly con-

sider whether a "less drastic" order will satisfy "the ends of the [FTC] Act." 327 U.S. at 612-13.

Two undisputed facts demonstrate that the inconvenience imposed on consumers by not being able to shop for cars on three evenings and Saturday is minimal. First, the closings occurred at those times when there were fewest shoppers. The sales personnel, who earn a living on commissions, would not demand to close at hours when many sales could be made. Second, Detroit is ringed with communities where Saturday and evening hours are the norm. If the inability to shop on Saturday were more inconvenient than a half hour drive, consumers would simply drive to an open dealership, an alternative ignored by the FTC. 28a. The FTC offered no testimony of a consumer claiming to have been inconvenienced.

The remedy to this inconsequential inconvenience will cause disproportionate harm to consumers and Dealers. The FTC conceded that its order would impose monetary costs on Dealers, thereby increasing the cost of cars to consumers. It discounted this cost on the assumption that the increased cost would be spread among more hours. 83a n.22, 96a. But spreading the increased cost among more hours will not lower the price of cars. More significantly, the FTC ignored the most serious repercussion of its order. For a quarter of a century, Dealers who extended their hours were subjected to such coercion as destruction of property, assaults on employees and customers, bombs, death threats to themselves and their families.[8] The coercion was intended to, and did, force the

[8]The testimony was chilling: "My brother walked across the showroom and someone shot a rifle through the window." "[T]here was quite a few nights I slept with a shotgun next to my bed. We were frightened." "[A] stick of dynamite was hooked up to a light switch somehow in the clean-up shop. . . . " "There were collections taken [by sales personnel] to bring in outside goons to do damage. . . ." "I was begging for a police

Dealers to reduce their hours, as the FTC acknowledged. 56a-61a. By ordering the Dealers to lengthen their hours, the FTC exposes them to renewed labor unrest and retaliation by their employees and unions.

The FTC abused its discretion because it failed to weigh the minimal benefits from longer hours against the serious risk of harm that longer hours will entail. Its justification for exposing the Dealers to violence (*i.e.*, the *FTC* will not be "cowed" by threats that the *Dealers* will be injured) is false bravado because the FTC faces no threat. 98a. In an analogous case, an order was vacated as an abuse of discretion because the case was "a close question" and the order "would be of minor significance to the realization of the goals of the Act ... and would place an unfair burden on Wards." *Montgomery Ward & Co. v. FTC*, 691 F.2d 1322, 1334 (9th Cir. 1982).

4. The mandatory opening provision violates the Norris-LaGuardia Act ("N/LG Act"), which prohibits a court in a case involving a labor dispute from issuing an injunction prohibiting any person from ceasing to perform work. 29 U.S.C. § 104. It does not matter whether the conduct is exempt; if the refusal to work arises in a case involving a labor dispute a court cannot order the return to work. *Milk Wagon Drivers' Union v. Lake Valley Farm Products*, 311 U.S. 91, 100-103 (1940). It is indisputable that the present case involves a labor dispute. Nor can it seriously be doubted that the FTC's order

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officer." "I bought three or four good sized fire extinguishers, had them installed in my home." "You don't know — if you've never experienced the Teamsters, playing with the Teamsters. Ask Jimmy Hoffa. I mean, they play tough up here and they play hardball."

prohibits persons involved in the dispute from not performing work.[9]

[9]The order does not directly require employees to work on Saturdays or in the evenings. The FTC asserts that employees can avoid longer work hours by agreeing to split shifts or by increasing the size of the work force. 97a. The suggestion is contrary to the FTC's own findings. It was to avoid splitting shifts or sharing commissions among a larger number of employees that led the employees to demand uniform hours. Lengthening the sales week will inevitably force employees to lengthen their work week.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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